Petition

Office - Supreme Court, U.S.
FILED
JAN 13 1982
ALEXANDER L. STEVAS,
CLERK

81-1311

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JEROME SACKS,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LEONARD S. RUBENSTEIN
1735 20th Street, N.W.
Washington, D.C. 20009
(202) 797-7120
Attorney for Petitioner

January, 1982

Washington, D.C. • THIEL PRESS • (202) 638-4521

QUESTION PRESENTED

Whether federal jurisdiction to entertain a petition for a writ of habeas corpus may be defeated by the fact that state exhaustion procedures are so drawn out, despite the diligent pursuit of his remedies by the petitioner, that by the time the applicant files his petition in District Court he is no longer in physical custody.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 2

REASON FOR ALLOWING THE WRIT:

This Case Presents an Important and Recurring Question of Habeas Corpus Jurisdiction Which Has Never Been Decided by This Court 5

CONCLUSION 8

APPENDIX:

Court of Appeals Judgment 1a

Court of Appeals Order 3a

District Court Opinion 13a

TABLE OF AUTHORITIES

Cases:

Carafas v. LaVallee, 391 U.S. 234 (1968) 6, 7

Fay v. Noia, 372 U.S. 391 (1963) 6, 7

Hensley v. Municipal Court, 411 U.S. 345 (1972) 7

Jones v. Cunningham, 371 U.S. 236 (1963) 7

Stone v. Powell, 428 U.S. 465 (1976) 5

Statutes:

28 U.S.C. § 2241 ..... *passim*

28 U.S.C. § 2254 ..... *passim*

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JEROME SACKS,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

Neither the opinion of the District Court nor that of the Court of Appeals has been reported. They are reproduced in the Appendix.

JURISDICTION

The decision of the Court of Appeals was rendered on October 15, 1981. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

28 U.S.C. § 2241 provides, in pertinent part:

> (c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> * * *
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254 provides, in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

STATEMENT OF THE CASE

Jerome Sacks, a shopkeeper in Indianapolis, was found guilty in Marion County, Indiana, Criminal Court of the crime of receiving stolen property—a television set—on February 11, 1975. It was his first conviction after a long career of community involvement and compliance with the law. From the initiation of the

prosecution until now, he has maintained his innocence of the offense charged.

At his trial, Sacks was represented by an attorney who, by his own admission, had done literally no work to prepare for it. At a hearing on Sacks' Petition for Post-Conviction Relief, the Indiana equivalent of habeas corpus, the attorney admitted that he made no discovery efforts, did not investigate the case, did not prepare his client to testify, did not prepare to cross-examine the principal witness against his client and did no legal research. Indeed, he acknowledged that he was not even expecting to try the case on the day it was called, and had even advised his client that they would be going to court solely for the purpose of obtaining a continuance. He did not, however, take the elementary step, required under Indiana law, of filing a motion for a continuance in writing.

As a result, Sacks was found guilty and sentenced to a term of imprisonment of from one to ten years and fined $5000. Sacks remained on bond and appealed his conviction. In August, 1977, after affirmance, he began serving his sentence and filed a Petition for Post-Conviction Relief, alleging ineffective assistance of counsel. The trial court held a hearing, at which the evidence summarized above was elicited, but denied relief, relying on the Indiana "mockery of justice" standard for claims of ineffective assistance of counsel. The court stated:

> An excellent attorney can walk in cold and develop a case and some who aren't very good can work a hundred hours and not do a thing. But in any case, I can see that there were some things that could have been done, possibly, or that another attorney might have done what Mr. Ward did not. The

> standard in the State of Indiana is still that the trial must be a mockery of justice; tactical errors, trial tactics, minimal consultation, failure to introduce evidential witnesses, failure to interview witnesses, failure to object, impeach, or show a lack of motive, these are not as a matter of law sufficient to constitute incompetent or ineffective assistance of counsel.

Sacks appealed the trial court's decision but the Indiana appellate process, despite Sacks' own diligence, consumed more than two years. In December, 1979, the appellate court reaffirmed the Indiana "mockery of justice" standard for claims of ineffective assistance of counsel, and affirmed the trial court. By this time, however, Sacks not only had completed his institutional confinement, but on August 17, 1979, had completed his parole.

Having finally exhausted state remedies, Sacks filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Indiana in February, 1980. On February 10, 1981, the court dismissed the petition without reaching the merits, holding that, inasmuch as Sacks was no longer incarcerated or on parole, the court was without jurisdiction to grant Sacks any relief. App. 13a.

Sacks obtained a certificate of probable cause and appealed to the United States Court of Appeals for the Seventh Circuit. The Court of Appeals affirmed, holding that notwithstanding petitioner's efforts to comply with habeas corpus procedure, and notwithstanding the fact that relief in Indiana was unlikely because of its "mockery of justice" standards for claims of ineffective assistance of counsel, Sacks was without a federal remedy because he was not in custody or on parole by the time

his petition was filed in district court. App. 3a. The Court of Appeals found the decisions of this Court somewhat inconsistent on the proper disposition of the case, App. 10a, 11a and n.14, and acknowledged that its own resolution meant that "the dilemma created by cases such as this unfortunately remains," App. 12a, but upheld the district court's dismissal of the case.

REASON FOR ALLOWING THE WRIT

This Case Presents an Important and Recurring Question of Habeas Corpus Jurisdiction Which Has Never Been Decided by This Court

The Court of Appeals recognized the anomaly—and the unfairness—created by its decision: in a case in which federal consideration of the merits of the petition was clearly warranted, App. 11a, and where Sacks was diligent in pursuing state remedies he was bound to exhaust, he was denied the right of federal habeas corpus because he was in custody when he filed the state petition (indeed, he filed it immediately upon incarceration) but not when he filed the federal petition. There is no doubt, furthermore, that Sacks was denied the "full and fair opportunity" to litigate his federal constitutional claim, *Stone v. Powell*, 428 U.S. 465 (1976), because of Indiana's refusal to apply federal constitutional standards to his claim.[1] Under these circumstances, neither the language of 28 U.S.C. §§ 2241

---

[1] The Court of Appeals took specific note of the difference between the "mockery of justice" standard for claims of ineffective assistance of counsel applied in Indiana and its own "minimum standard of professional representation" for such claims. App. 11a and n.16.

or 2254, nor the decisions of this Court compelled the Court of Appeals to reach the "unfortunate" result it did.

Prior decisions of this Court, recognizing the relationship between the exhaustion requirement and the jurisdiction of the federal courts to grant writs of habeas corpus, have held that the prisoner need not literally be in custody in order for a federal court to grant the writ. In *Carafas v. LaVallee*, 391 U.S. 234 (1968), the petitioner had been released from custody by the time the case reached this Court. A question was therefore raised whether the Court had jurisdiction to grant any relief, since both the basis and remedy for habeas corpus—custody and release from custody—no longer existed. It held, however, that so long as the petitioner was in custody when his petition for habeas corpus was filed, the Court had jurisdiction. In so deciding, the Court relied heavily on the time expended exhausting state remedies:

> [Petitioner's] path has been long—partly because of the inevitable delays in our court processes and partly because of the requirement that he exhaust state remedies. He should not be thwarted now and required to bear the consequences of assertedly unlawful convictions simply because the path has been so long that he has served his sentence.

391 U.S. at 240.

This reasoning is consistent, moreover, with this Court's explanation of the relationship between the exhaustion requirement and habeas corpus jurisdiction. In *Fay v. Noia*, 372 U.S. 391 (1963), the Court explained that the exhaustion requirement meant only the postponement, not the relinquishment, of federal jurisdiction. 372 U.S. at 420. In particular, the purpose of federal habeas corpus would be subverted if made to

depend on the vicissitudes of the petitioner's journey through the state system: under such circumstances, "a rule of timing would become a rule circumscribing the power of the federal courts on habeas corpus, in defiance of unmistakable congressional intent. *Id.* This is precisely what happened here, with the consequence of undermining Sacks' constitutional guarantee of effective assistance of counsel, as defined in the federal courts.

In other circumstances, too, the Court has held that the "in custody" requirement cannot be literally applied as a basis for federal jurisdiction. In *Hensley v. Municipal Court*, 411 U.S. 345 (1972), for example, it held that the non-custodial status of release on recognizance met the "in custody" jurisdictional requirement. And in *Jones v. Cunningham*, 371 U.S. 236 (1963), the same conclusion was reached with respect to parole status.

These cases, particularly *Carafas v. LaVallee, supra*, should control this case. While the Court has never had occasion to address the precise question presented here—whether custodial status at the time of filing the state petition, combined with diligent pursuit of state remedies, meets the requirement for habeas corpus jurisdiction—no principled distinction exists between this case and *Carafas*. In either event, granting the writ cannot bring the relief of release from custody, although it would have been available when the process of habeas corpus began. Certainly the Court of Appeals suggested no reason why it should make a difference whether custodial status terminated during the state or federal proceedings. On the contrary, it found the rationale of *Carafas* troubling to its own resolution of the question before it. And rightly so, since its decision might well defeat the very purpose of the writ in many cases, and permit the miscarriage of justice as occurred here.

Because of the Court of Appeals' own uncertainty concerning the proper disposition of this case, the apparent conflict between the decision below and the decisions of this Court, and the fact that this Court has never directly answered the question presented here, the question should be resolved in this case. It is particularly appropriate to resolve the issue in view of the enormous federal habeas corpus caseload; the lower courts should not, as happened here, devote their resources to questions of jurisdiction in habeas corpus cases. Moreover, this case presents a simple, uncluttered record on a question which is bound to recur and which must ultimately be resolved by this Court.

CONCLUSION

For the foregoing reasons, the Court should issue a Writ of Certiorari to review the judgment of the Court of Appeals.

Respectfully submitted,

LEONARD S. RUBENSTEIN
1735 20th Street, N.W.
Washington, D.C. 20009
(202) 797-7120
Attorney for Petitioner

January, 1982

APPENDIX

Unpublished Per Curiam Order

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 81-1363

[Filed: October 15, 1981]

JEROME SACKS,
Petitioner-Appellant,

v.

STATE OF INDIANA,
Respondent-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

No. 80 C 116

Judge James E. Noland

BEFORE: Hon. Wilbur F. Pell, Jr., Robert A. Sprecher, and William J. Bauer, Circuit Judges.

JUDGMENT-ORAL ARGUMENT

This cause was heard on the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the Order of this Court entered this date.

Unpublished Order
Not To Be Cited Per Circuit Rule 83

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 81-1363

[Filed: October 15, 1981]

[Argued: October 6, 1981]

JEROME SACKS,
Petitioner-Appellant,

v.

STATE OF INDIANA,
Respondent-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

No. IP 80-116-C

James E. Noland, *Judge*

BEFORE: Hon. Wilbur F. Pell, Jr., Robert A. Sprecher, and William J. Bauer, Circuit Judges.

ORDER

This is an appeal from an order granting the respondent-appellee's motion for summary judgment which was entered on the ground that the district court lacked

jurisdiction to entertain the petitioner-appellant's application for a writ of habeas corpus. The issue presented is whether the district court had the power to grant a writ of habeas corpus when the petitioner did not file his application in that court until after the expiration of his state sentence, due to the fact that he had not completed the process of exhaustion of state remedies prior to that time. For the reasons set forth below, we affirm the order of the district court.

On February 11, 1975, the petitioner-appellant, Jerome Sacks, was found guilty in the Marion County, Indiana, Criminal Court of the crime of receiving stolen property. He was sentenced to a term of imprisonment of from one to ten years and was fined $5,000. After conviction, he remained on bond and unsuccessfully appealed his conviction through the Indiana courts. He began serving his sentence in August, 1977.

While incarcerated, Sacks filed a petition for post-conviction relief in state court, alleging ineffective assistance of trial counsel. That request was denied. Sacks appealed from the decision of the trial court to the Indiana Court of Appeals. On December 12, 1979, that court denied Sacks' appeal. By the time that decision was issued, Sacks had been released from prison and discharged from parole.

Nevertheless, on February 20, 1980, Sacks filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Indiana, realleging his claim of ineffective assistance of counsel. The state moved for summary judgment on the ground that, inasmuch as Sacks had been released from parole, the court lacked jurisdiction to entertain the application. On February 10, 1981, the district court granted that motion. This appeal followed.

The power of a federal court to grant a writ of habeas corpus to a state prisoner is conferred by 28 U.S.C. § 2241, which provides in pertinent part:

> (c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States.

The district court rested its conclusion that it lacked jurisdiction on two bases: (1) on the date of the filing of his petition in federal court, the appellant was not subject to "any restraint on his liberty which has been held to constitute custody for the purposes of 28 U.S.C. § 2241 . . .,"[1] and (2) the appellant's petition could not be considered to "relate back" to an earlier habeas corpus petition, alleging a different constitutional violation, which the appellant had filed while he was in physical custody.

On appeal, Sacks does not contest either of those findings.[2] Rather, he argues that if a petitioner is "in custody" at the time he begins the process of exhaustion of state remedies required by 28 U.S.C. § 2254(b),[3] a

---

[1] Specifically, the court found that the appellant's inability to obtain a pawnbroker's license did not "amount to a sufficiently severe restraint on his individual liberty to bring him within the custody requirement."

[2] The appellant does not "urge this court to hold, that the collateral consequences of conviction alone, without any prior incarceration, [are] sufficient to constitute 'custody' within the meaning of § 2254." (Appellant's Brief at 13 n.6.)

[3] 28 U.S.C. § 2254(b) provides in pertinent part:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State. . . .

federal district court has jurisdiction to entertain a petition filed at the completion of that process even if the petitioner is no longer "in custody" at that time. He would have the federal district court refer to the date of filing for state post-conviction relief in determining whether it has jurisdiction under § 2241.[4]

The answer to this claim must begin with the statute. Although § 2241(c) does not explicitly refer to the time at which a petitioner must be "in custody," the Supreme Court has read the statute to require "that the applicant must be 'in custody' when the application for habeas corpus is filed." *Carafas v. LaVallee,* 391 U.S. 234, 238 (1968).[5] Clearly, this refers to the federal petition. *Hensley v. Municipal Court,* 411 U.S. 345, 352 (1972).[6] We have also recognized that in determining if the "in custody" requirement of § 2241(c) has been met, the district court must focus on the time of the filing of the federal habeas corpus application. *Neville v. Cavanaugh,* 611 F.2d 673, 675 n.4 (7th Cir. 1979), *cert. denied,* 446 U.S. 908 (1980).

The relevant date in this case is February 20, 1980. On that date, the appellant was not "in custody" within the meaning of the statute. Thus, the district court's determination was correct.

---

[4] The appellant admits that even under his theory a petitioner must diligently pursue his state remedies. Because of the conclusion reached below, we need not discuss that issue.

[5] The Court found that "[t]his is required not only by the repeated references in the statute, but also by the history of the great writ." *Id.* (footnotes omitted).

[6] In that case, the Court noted that "[e]ven if petitioner remained in jail *only long enough to have his petition filed in the District Court,* his release by order of the District Court would not jeopardize his 'custody' for purposes of a habeas corpus action." (Emphasis added.)

The appellant's argument to the contrary contains two mistaken premises. First, he claims that the district court, in refusing to entertain the application, has permitted the statutory exhaustion requirement to deny him federal review. The appellant is correct in his assertion that exhaustion is not a jurisdictional predicate. *Fay v. Noia*, 372 U.S. 391, 420 (1963); *Echevarria v. Bell*, 579 F.2d 1022, 1025 (7th Cir. 1978). It is not a limit on federal jurisdiction when that jurisdiction otherwise exists. However, the appellant fails to appreciate that for a federal district court to have jurisdiction over a habeas corpus petition in the first instance, the petitioner must *allege* that he is "in custody in violation of the . . . laws . . . of the United States." Although the appellant may have satisfied the other jurisdictional conditions at a certain point, he did not present his claim to a federal court at that time. Thus, it was not the exhaustion requirement that undermined his federal claim, but his own failure to file.[7]

The appellant's second confusion relates to his assertion that filing for post-conviction relief in state court should somehow give rise to federal court jurisdiction over the same legal claim. There is no authority for the proposition that the act of filing in a state court can fulfil the requirement imposed by the federal habeas corpus statute. Each of the cases relied on by the appellant involved a federal habeas corpus petition filed in federal

---

[7] Even if the appellant acted in good faith in waiting until his state remedies were exhausted before filing his federal habeas corpus application, he cannot correct that deficiency now. The question of what steps, if any, he might have taken to pursue federal habeas relief while state exhaustion procedures were still pending in view of the imminence of a cessation of custody status is a question not before us and one we deem inappropriate to address.

district court while the petitioner was "in custody" within the meaning of § 2241.[8]

In *Harrison v. Indiana*, 597 F.2d 115 (7th Cir. 1979), the petitioner was in custody when he filed his federal petition, but pursuant to a conviction subsequent to the one he was attacking. Nevertheless, this court found the "in custody" requirement satisfied. It also found that the cause was not rendered moot by the petitioner's release from custody *after* the filing but before the district court's determination. The appellant's intimation that the federal court's jurisdiction in that case was based on Harrison's state court habeas proceeding is mistaken.[9]

Likewise, in *United States ex rel. Williams v. Morris*, 594 F.2d 614 (7th Cir. 1979), the petitioners were all "in custody" at the time of filing their federal habeas corpus petitions. Subsequently, each of the petitioners was released during the pendency of the proceedings, and this court found that none of the causes were moot.

In reference to *Williams*, the appellant also argues that the language used by this court to dispose of that case implies that in certain circumstances a petitioner, no longer "in custody," can still apply for federal habeas corpus relief. The excerpt in question reads:

---

[8] The appellant cites cases dealing with the construction of the meaning of "custody" within § 2241, *e.g.*, *Hensley v. Municipal Court*, *supra*, and cases involving release of the petitioner after the application in federal court, *e.g.*, *Carafas v. LaVallee*, *supra*, but none suggesting a variation of the "time of filing" requirement.

[9] This court's reference to the fact that "Harrison had begun his pursuit of post-conviction relief in state courts well before the sentence for the conviction under attack was fully served," *id.* at 116, does not alter that result. The critical point was that Harrison filed his federal application while "in custody."

> We therefore find that to require these petitioners, *none of whom is presently in confinement,* to resort to available state remedies is not an exercise in futility. Reversed and remanded with directions to *dismiss* the petitions, but *without prejudice* in the event our expectations for some reason prove to be misguided.

Id. at 619 (emphasis added).

The appellant's interpretation of that disposition is as follows: Because the court ordered the petitions dismissed, any future action in federal court (which would be required if the state remedies failed) would have to be based on independent petitions; yet the petitioners were no longer "in custody;" thus, if the state remedies did fail, the court had invited applications from petitioners not "in custody." To the extent that the language supports the proposition that a petitioner, no longer "in custody," can initiate a federal application, it is incorrect. The subsequent history of the case demonstrates that the district court did not follow such a construction. Although the district court did eventually grant writs of habeas corpus to these same petitioners, those writs were not based on independent petitions. Rather, when the case was remanded, the district court did not dismiss the action, but placed it on a "past case calendar."[10] Thus, in its subsequent rulings, the court was relying on the jurisdiction based on the original "in custody" petitions.

Finally, in *Carafas v. LaVallee,* 391 U.S. 234 (1968), the issue was "whether the expiration of [a] petitioner's sentence, before his application was finally reviewed . . .,

---

[10] Transcript of Proceedings held on May 17, 1979 at p. 5, *United States ex rel. Williams v. Morris,* 483 F. Supp. 775 (N.D. Ill. 1980).

terminate[d] federal jurisdiction with respect to the application." *Id.* at 237. The Court specifically noted that at the time of his application in federal court the petitioner was "in custody." *Id.* at 236. Thus, the initial jurisdictional requirement was met. In answer to the broader question, the Court found that "under the statutory scheme, once the federal jurisdiction has attached in the District Court, it is not defeated by the release of the petitioner prior to completion of proceedings on such application." *Id.* at 238. Thus, because of "collateral consequences" which continued to affect the petitioner after his release, the case was not rendered moot.[11]

Although the rule followed in *Carafas* reinforces the district court's disposition in the present case, the rationale of that decision does create a problem. In *Carafas,* the petitioner was "in custody" at the time of filing, but was completely discharged from the threat of physical custody by the state prior to the resolution.[12] Only the "collateral consequences" remained. Thus, if a writ was to be granted, it could only affect those vestiges of the prior custody.

---

[11] The Court found that "[b]ecause of these 'disabilities or burdens [which] may flow from' petitioner's conviction, he has 'a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him.'" *Id.* at 237 (citation omitted).

[12] Thus, *Carafas* represents the Supreme Court's broadest reading of § 2241. *Compare Jones v. Cunningham,* 371 U.S. 236 (1963) (parole); *Peyton v. Rowe,* 391 U.S. 54 (1968) (consecutive sentences); and *Hensley v. Municipal Court, supra* (release on own recognizance). In each of those cases the petitioner was in jeopardy of future physical restraint by the state.

In this case, the appellant also was once "in custody."[13] Although he was released before he filed in federal court, his petition in effect asks the court to act upon the same "collateral consequences" that were found to be sufficient substance in *Carafas.*[14] The appellant's dilemma is further exacerbated by the fact that his journey through the state post-conviction relief process took over two years.[15] And finally, the legal issue involved—competence of counsel—is one in which federal review can make a specific difference.[16] From this perspective, it appears that the appellant very well may have fallen prey to a situation where his "failure to

---

[13] Thus, this case is different from *Hanson v. Circuit Court of the First Judicial Circuit,* 591 F.2d 404 (7th Cir.), *cert. denied,* 444 U.S. 907 (1979), in which a "fine-only" conviction was found to be insufficient to constitute "custody" for purposes of a federal habeas corpus action.

[14] This is the point of inconsistency raised by *Carafas.* If two petitioners, A and B, are both "in custody" on Monday and both released on Tuesday, A, who files on Monday, can have his case heard, while B, who files on Tuesday, cannot. Yet, on Tuesday, and each day thereafter, the petitioners have identical "stake[s] in the judgment[s] imposed on [them]."

[15] The parties are in dispute over who is responsible for much of that delay. We need not resolve that question. Suffice it to say that there was a seventeen month interval between the filng of briefs in the Indiana Court of Appeals and the issuance of that court's decision.

[16] Indiana courts continue to apply the "mockery of justice" standard in determining the competence of counsel. *Sacks v. Indiana,* No. 2-378-A-84 (Ind. Ct. App., Dec. 12, 1979) (Appendix of Appellant at 28). In *United States ex rel. Williams v. Twomey,* 510 F.2d 634, 641 (7th Cir.), *cert. denied,* 423 U.S. 826 (1975), this court "broadened" that rule and held "that the Constitution guarantees a criminal defendant legal assistance which meets a minimum standard of professional representation."

spend even 10 minutes in jail is enough to deprive the District Court of power to hear his constitutional claim." *Hensley v. Municipal Court, supra* at 353.

The appellant concedes that "collateral consequences" alone are insufficient to establish the "custody" requirement of jurisdiction. *See Harvey v. South Dakota,* 526 F.2d 840 (8th Cir.), *cert. denied,* 426 U.S. 911 (1976); *Harrison v. Indiana, supra.* For the reasons noted above, his attempt to redefine the "time of filing" must also fail. Thus, the rule as written precludes the appellant from correcting the jurisdictional deficiency at this time although the dilemma presented by cases such as this unfortunately remains.

The order of the district court is accordingly AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IP80-116-C

JEROME SACKS

v.

STATE OF INDIANA

ENTRY

This cause comes before the Court on the petition of the petitioner, Jerome Sacks, for writ of habeas corpus, the respondent's order to show cause deemed a motion for summary judgment, petitioner's response thereto, and respondent's reply to petitioner's response. The Court, having considered the foregoing and being duly advised, does now submit its ruling. The respondent's motion for summary judgment is granted. Petitioner's motion for leave to expand record or for evidentiary hearing is denied.

IT IS SO ORDERED.

Dated this 10th day of February, 1981.

/s/ James E. Noland, Judge
United States District Court
Southern District of Indiana

MEMORANDUM

Petitioner was convicted of theft by receiving stolen property on February 11, 1975, and was thereafter sentenced to 1-10 years in prison and fined $5000. On February 15, 1977, the Indiana Court of Appeals affirmed petitioner's conviction and on March 31, 1977, denied his application for rehearing. Petitioner's petition for transfer was denied by the Indiana Supreme Court on July 5, 1977. A petition for post-conviction relief was filed in the trial court which raised issues completely unrelated to those raised previously before the Indiana Court of Appeals and the Indiana Supreme Court, and this petition was denied November 16, 1977.

Petitioner filed his first petition for writ of habeas corpus on August 1, 1977, seeking relief on two grounds. First, petitioner contended that an article which appeared in an Indianapolis newspaper during the trial denied him a fair trial because of its prejudicial impact on the jurors. Second, petitioner alleged that he was subjected to a more stringent standard in obtaining a continuance prior to trial than the standard applicable to the prosecution, and that the denial of his motion for continuance resulted in inadequate representation as he was unable to secure the presence of an attorney who represented him in a prior trial on the same charges. The petition was dismissed without prejudice on December 28, 1977, for petitioner's failure to allege that he had exhausted all of his state remedies as prescribed by 28 U.S.C. § 2254.

A second petition for writ of habeas corpus was filed January 13, 1978, raising identical grounds for relief but making the proper exhaustion allegations. This petition was denied on the merits, October 24, 1978, and the cause was dismissed.

On August 17, 1979, petitioner was discharged from parole. The Indiana Court of Appeals affirmed the denial of post-conviction relief on December 12, 1979, in an unpublished opinion and on February 20, 1980, petitioner filed the instant application, in which he alleges that he was denied effective assistance of trial counsel. He asserts that because he has been a pawnbroker for thirty years and cannot now obtain a pawnbroker's license as a result of his conviction, he is in custody for purposes of habeas corpus jurisdiction.

Jurisdiction of habeas corpus proceedings in the United States District Court is predicated upon petitioner's custody. The statute conferring the power to grant the writ, 28 U.S.C. § 2241, states in pertinent part that:

> (c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> (3) He is *in custody* in violation of the Constitution or laws or treaties of the United States.

In addition, 28 U.S.C. § 2254 provides that:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a writ of habeas corpus in behalf of a person *in custody* pursuant to the judgment of a State Court only on the ground that he is *in custody* in violation of the Constitution or laws or treaties of the United States. [Emphasis added.]

The meaning of "custody" has not always been clearly defined by the Supreme Court. Though it was generally held to mean physical confinement, other constructions of custody have evolved. Early cases demanded something more than "moral restraint", *Wales v. Whitney*,

114 U.S. 564, 571-72 (1885). Recent cases have held that custody exists when one is on parole, *Jones v. Cunningham*, 371 U.S. 236 (1963); on probation, *United States ex rel. Wojtycha v. Hopkins*, 517 F.2d 420 (3d Cir. 1975); on bail or own recognizance, *Hensley v. Municipal Court*, 411 U.S. 345 (1973). The Supreme Court has also held that a prisoner serving a sentence who wished to attack a consecutive sentence was in "custody," *Peyton v. Rowe*, 391 U.S. 54 (1968), and that a prisoner in custody in one jurisdiction who wishes to attack a conviction mandating future custody in another jurisdiction is in "custody" to the extent that any detainer or formal demand for custody has been lodged against him by the expectant jurisdiction. *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484 (1973). In addition, a petitioner who was unconditionally released subsequent to the filing of his petition for writ of habeas corpus was found to be in "custody" within the meaning of the statute. *Carafas v. LaVallee*, 391 U.S. 234 (1968). The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for *severe restraints* on individual liberty. *Hensley*, 411 U.S. at 351.

It has been generally held that the inability to pursue certain professions or obtain business licenses does not involve the requisite "restraint on liberty" that *Hensley* appears to mandate in order to constitute custody. *Harvey v. South Dakota*, 526 F.2d 840 (8th Cir. 1975); *Edmonds v. Chang*, 509 F.2d 39 (9th Cir. 1975); *Furey v. Hyland*, 395 F. Supp. 1356 (D.N.J. 1975). The Supreme Court has recognized that "once licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees." *Bell v. Burson*, 402

U.S. 535 at 539 (1971). Yet the loss of this interest, though recognized as a serious consequence of a conviction, has not been elevated to a level of restraint as would be tantamount to custody for purposes of the habeas corpus statute.

In *Furey* a physician sought habeas relief from a conviction resulting in a suspended sentence and a fine. He asserted the possibility that he would be deprived of his license to practice medicine and would be damaged in reputation and status in the community as the basis for the district court's jurisdiction to entertain his petition. The Court held that when there was no evidence that license revocation proceedings were pending or contemplated, such restraint on his liberty was too speculative to provide a basis for concluding that the petitioner was "in custody." And though this case is factually distinguishable from the instant action, in that any restraint which that petitioner might have suffered was only potentially prospective, the Court noted that it would reach no different result if petitioner had been presently subject to a license revocation.

Turning to the instant facts, it is clear that petitioner was not in custody when his petition was filed February 20, 1980. Neither was he on parole, probation, bail or his own recognizance or subject to any other restraint on his liberty which has been held to constitute custody for purposes of 28 U.S.C. § 2241 and 28 U.S.C. § 2254. That petitioner is unable to obtain a pawnbroker's license does not amount to a sufficiently severe restraint on his individual liberty to bring him within the custody requirement. Therefore, this Court lacks jurisdiction to entertain this petition for writ of habeas corpus and respondent's motion for summary judgment is hereby granted.

Petitioner next argues that jurisdiction attached with the filing of his first application for writ of habeas corpus, claiming that a denial and dismissal without prejudice affects none of his rights or remedies. He further maintains that in any case, it attached with the filing of his second application and remained attached when he later filed this "Corrected application" for writ of habeas corpus. In support of this proposition, petitioner cites *Carafas v. LaVallee,* 391 U.S. 234 (1968), wherein the Court stated that, "once the federal jurisdiction has attached in the district court, it is not defeated by the release of the petitioner prior to the completion of the proceedings on such application."

There are two problems with petitioner's argument. First, the "quasi-relation back" doctrine he propounds has no legal foundation in the context of habeas corpus actions. Rule 15(c) of the Federal Rules of Civil Procedure provides for the relation back of *amendments to the pleadings.* It states in relevant part that, "[W]henever the claim or defense asserted in the *amended pleading* arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the *amendment* relates back to the date of the original pleading." (Emphasis added.) The petitioner's third application cannot be considered an amendment which will relate back since the claim asserted did not arise out of the conduct, transaction or occurrence set forth in his first two petitions for writ of habeas corpus. In his third petition, petitioner alleges that he was denied effective assistance of counsel *present* at trial, whereas in the first two petitions, he asserted that he was denied a fair trial because of the prejudicial effect of a newspaper article on the jury and because of the *absence* of an attorney who had previously represented him.

Regardless, it is clear that neither a denial and dismissal without prejudice for failure to allege exhaustion of state remedies nor a denial on the merits will constitute or be deemed a pleading within the context of Rule 15.

In addition to the foregoing, it has been held that Rule 15 is not to be viewed as enlarging or restricting jurisdiction. The effect of the amendment on the Court should be no more than merely corrective." *USM Corporation v. GKN Fasteners Ltd.*, 578 F.2d 21 (1st Cir. 1978). To allow the third application, filed after petitioner was unconditionally released from custody, to relate back would have the effect of expanding and enlarging the habeas corpus jurisdiction of the district court. Moreover, in *Wade v. Mississippi Cooperative Extension Service,* 424 F. Supp. 1242 (D.C. Miss. 1976), the Court held that plaintiff's failure to exhaust EEOC remedies prior to filing the present action, albeit because such remedies were unavailable at the time, could not be cured by the relation back provision of Rule 15(c) of the Federal Rules of Civil Procedure. In that case the plaintiffs were attempting to justify an award of attorney's fees on the basis of Title VII for the original employment discrimination suit filed two years prior to the effective date of Title VII. The Court found that the plaintiffs could not satisfy the jurisdiction prerequisites to a Title VII action by exhausting EEOC remedies after the district court had rendered judgment on the original action. Thus, the petitioner's failure to exhaust all of his state remedies prior to his release from custody, even though only the affirmance of the denial of post-conviction relief was not rendered until he had been released, cannot be cured by the relation back provision of Rule 15(c).

Second, the supporting dicta cited by petitioner from *Carafas* is true in the context of that case but has no application to the instant facts. Petitioner has confused the concepts of mootness and jurisdiction. The petitioner in *Carafas* was still in custody when he filed his petition for writ of habeas corpus, though he was unconditionally released thereafter. The issue presented was whether the Court's jurisdiction continued after his release. In other words, did his release from custody moot the case? Under those facts the validity of the excerpt from *Carafas* is apparent. That the federal jurisdiction of a district court would attach with the filing of an application for writ of habeas corpus and continue *ad infinitum* notwithstanding a final judgment is a specious claim. Petitioner's mistaken reliance on the dicta bears this conclusion out.

While the legal restrictions and the stigma adversely affecting petitioner's chosen occupation prevent this case from being moot, the Court is without jurisdiction to entertain these proceedings. Accordingly, the motion for summary judgment is granted.

Opposition

Office - Supreme Court, U.S.
FILED
FEB 11 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1311

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JEROME SACKS,

Petitioner,

VS.

STATE OF INDIANA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LINLEY E. PEARSON
Attorney General of Indiana
DAVID A. ARTHUR
Deputy Attorney General
Attorneys for Respondent
OFFICE OF ATTORNEY GENERAL
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 232-6332

Central Publishing Company, Inc., Indianapolis, IN 46206

QUESTION PRESENTED FOR REVIEW

Whether the Federal courts lack jurisdiction over a petition for a writ of *habeas corpus* filed after all state custody has ceased.

TABLE OF CONTENTS

PAGE:

Table of Authorities iii

Opinions Below 1

Jurisdiction 2

Statement of the Case

I. Nature of the Case 2

II. Course of Proceedings Below 2

Summary of the Argument 3

Reasons for Disallowance of the Writ 4

Conclusion 7

TABLE OF AUTHORITIES

CASES:	PAGE
Carafas v. LaVallee, 391 U.S. 234 (1968)	5
Fay v. Noia, 372 U.S. 391 (1963)	5
Hensley v. Municipal Court, 411 U.S. 345 (1972)	5, 6
Jones v. Cunningham, 371 U.S. 236 (1963)	5, 6
STATUTES:	
28 U.S.C. §2241(c)	5
RULES:	
Rule 17.1, Rules of the Supreme Court of the United States	4

No. 81-1311

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JEROME SACKS,

Petitioner,

VS.

STATE OF INDIANA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondent State of Indiana respectfully prays this Court deny issuance of a writ of certiorari to the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit), thereby refusing to review the decision entered by that Court in cause number 81-1363 on October 15, 1981.

OPINIONS BELOW

The Entry and Memorandum of the United States District Court for the Southern District of Indiana, Indianapolis Division, the Honorable James E. Noland (hereafter District Court), on February 10, 1981, in cause number IP 80-116-C, is unpublished and appears beginning at page 13a in the Appendix to the Petition

herein. The Judgment and Order of the Seventh Circuit affirming the denial of the petition for a writ of *habeas corpus* and entered on October 15, 1981, in cause number 81-1363, are unpublished and appear beginning at page 1a in the Appendix to the Petition herein.

JURISDICTION

Respondent does not dispute the allegations of the jurisdiction of this Court made by Petitioner and found at page 1 of the Petition.

STATEMENT OF THE CASE

I.
Nature of the Case

The Petition arises from the Judgment and Order of the Seventh Circuit, in which the Court affirmed the denial of a petition for writ of *habeas corpus* filed by a person allegedly in state custody. Petitioner alleges that the District Court erred in granting summary judgment to Respondent on the basis of lack of jurisdiction over the subject matter, Petitioner having been released from incarceration and discharged from parole prior to the filing of his petition in the District Court, and that the Seventh Circuit erred in its affirmance.

II.
Course of Proceedings Below

On February 11, 1975, Petitioner was sentenced to not less than one (1) nor more than ten (10) years and was fined in the amount of five thousand dollars ($5,000.00) pursuant to his conviction for the crime of theft of property of the value of $100.00 or more (receiving stolen property). Petitioner was released on bond pending appeal. The conviction was appealed to the Indiana Court of Appeals, Second District, which court affirmed the conviction on February 15, 1977. The Indiana Court of Appeals denied a petition for rehearing on March 31, 1977, and the Supreme

Court of Indiana denied transfer on July 5, 1977. Transfer is Indiana's equivalent of a writ of certiorari to the Court of Appeals. Petitioner began serving his sentence in August, 1977. Almost immediately upon beginning service of his sentence, Petitioner filed a petition for post-conviction relief, alleging for the first time that his trial counsel provided inadequate assistance. This petition was denied by the state trial court on November 16, 1977, and this denial was appealed by Petitioner.

On August 17, 1979, Petitioner was discharged from parole. As of that date, and to the present, Petitioner was not incarcerated, in physical custody, on probation or parole, on bail or his own recognizance, or in any way facing incarceration as a direct or sole result of his February 11, 1975, conviction and sentence.

On December 12, 1979, the Indiana Court of Appeals affirmed the denial of post-conviction relief.

Petitioner's petition for writ of *habeas corpus* was filed in the District Court on February 20, 1980, alleging ineffective assistance of counsel.

The petition was denied on February 10, 1981, for the reason that Petitioner was not in custody on the date that the petition was filed. The Seventh Circuit affirmed the judgment of the District Court on October 15, 1981.

SUMMARY OF THE ARGUMENT

The District Court and the Seventh Circuit properly focused upon the date of filing of the petition for writ of *habeas corpus* in the Federal courts as the date upon which custody must exist. The relevant statutes, as consistently interpreted and applied by this Court, compel that focus. There is no authority in either statute or case law for focusing upon a different date. Therefore, the decisions of the District Court and Seventh Circuit are consistent with and dictated by the controlling decisions of this Court. The decisions below are not inconsistent with controlling

decisions and do not deal with issues that have not been but should be determined by this Court. Therefore, the writ of certiorari should not be allowed.

REASONS FOR DISALLOWANCE OF THE WRIT

This case is not one coming within the terms of Rule 17.1 of the Rules of this Court, and no other substantial reason is advanced by Petitioner for having this Court grant the writ.

It is contended by Petitioner that this case presents an important and recurring question of *habeas corpus* jurisdiction that has not been decided by this Court. The issue presented has been decided on several occasions by this Court, though perhaps not with the precise language that Petitioner feels should appear in a decision so that that decision is expressly on point.

Petitioner contends that because he started the process of exhausting his available state remedies while still in custody, and because the exhaustion process culminated after his total release from custody of the State through no fault of his own and despite his own diligence, then he should not be precluded from bringing his constitutional claims into a Federal forum. This proposal is contrary to statute and contrary to decisions of this Court.

The only proper focus for a determination of custody is the date on which the petition is filed in Federal court.

While the decisions of this Court, including those relied upon by the Petitioner, contain broad, sweeping language, the holdings are quite narrow. Each holding recognizes that the

> root principle [of the writ of *habeas corpus*] is that in a civilized society, government must always be accountable to the judiciary for a man's *imprisonment*; if the *imprisonment* cannot be shown to conform with the fundamental requirements of law, the individual

> is entitled to his immediate release. *Fay v. Noia*, 372 U.S. 391, 402 (1963) (emphasis added).

While there is no longer a focus solely upon imprisonment or upon immediate release, the root principle enunciated in *Fay v. Noia* remains the root principle. Custody—whether present or future—must be justified.

Two words found in 28 U.S.C. §2241(c) are the *sine qua non* of jurisdiction over a petition—the applicant must be "in custody." The statute does not specify when custody must exist. However, this Court has consistently held that custody must exist at the time that the Federal petition is filed.

> The federal habeas corpus statute requires that the applicant must be "in custody" when the application for habeas corpus is filed. This is required not only by the repeated references in the statute, but also by the history of the great writ. Its province, shaped to guarantee the most fundamental of all rights, is to provide an effective and speedy instrument by which judicial inquiry may be had into the legality of the detention of a person. *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968) (footnotes and citation omitted).

In *Carafas*, the narrow holding is that once jurisdiction exists, it cannot be defeated by a subsequent release from state custody. The time of determining whether jurisdiction exists is the time of filing the application in Federal court—it is neither earlier (as Petitioner seeks) nor later.

The other cases relied upon by Petitioner are of the same import. The question in both *Hensley v. Municipal Court*, 411 U.S. 345 (1972), and *Jones v. Cunningham*, 371 U.S. 236 (1963), was whether at the time of filing the application, the applicant faced a significant, demonstrable threat of incarceration. The petitioner in *Hensley* faced incarceration should the series of stays end. The petitioner in *Jones* faced incarceration were he to deviate even slightly from the terms of his probation. In each case, that was a potential faced at the time of filing in the Federal court.

Were the possible focus the time of beginning the exhaustion process, neither *Hensley* nor *Jones* was a necessary decision. Both petitioners actually started the exhaustion process by entering a not guilty plea, at a time when each faced incarceration. The same is true of any petitioner if the focus were the beginning of the exhaustion process. In Petitioner's own case, the focus would be not on the date of filing his post-conviction petition but upon the date of his plea of not guilty, for that is the true start of exhaustion of state remedies. The statutory requirement of custody would, therefore, be no requirement at all. Any person who was ever incarcerated could pursue Federal *habeas corpus* relief, and the Great Writ would no longer be an extraordinary remedy reserved for cases of "severe restraints on individual liberty," *Hensley, supra*, at 350-51, and the Federal courts would be overwhelmed and overburdened.

Petitioner contends that this issue has not been determined by this Court, and that therefore this Court should settle the issue. One indication of whether or not an issue needs to be determined by this Court through writ of certiorari is a disagreement among the Circuits. No Circuit has ever held that any date other than the date of filing in Federal court is a proper focus. No such case is cited by Petitioner, and none can be found by Respondent. Therefore, the rule appears to be clear, and needs no further clarification.

It should be noted, while the issue presented for review does not contemplate additional issues, Petitioner could have applied to the Federal courts while still in state custody, seeking to prove that the state appellate remedies were inadequate because of their delay and that therefore assertion of Federal jurisdiction prior to the rendering of a state appellate decision would be proper. Petitioner therefore had it within his power to seek to avoid the result he now characterizes as "harsh."

The Petitioner has not presented an issue that has not

been addressed by this Court, nor an issue that need be resolved by this Court. Therefore, the writ of certiorari should not be allowed.

CONCLUSION

For the foregoing reasons, it is respectfully urged that a writ of certiorari be denied.

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana

DAVID A. ARTHUR
Deputy Attorney General

Attorneys for Respondent